

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CANER N. HALL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 03-008-SLR
)	
DEPARTMENT OF VETERANS)	
AFFAIRS,)	
)	
Defendant.)	

MEMORANDUM ORDER

I. INTRODUCTION

On January 6, 2003, plaintiff Caner N. Hall, a pro se litigant, filed this action pursuant to 38 U.S.C. § 1151 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (D.I. 2, 3) Presently before the court is defendant's motion to dismiss (D.I. 11) and plaintiff's motions for default judgment (D.I. 12), to disqualify the United States Attorney (D.I. 14) and to amend his complaint (D.I. 13, 15). Because this court lacks subject matter jurisdiction, defendant's motion to dismiss is granted and plaintiff's motions are denied as moot.

II. BACKGROUND

In his complaint, plaintiff states that he is a 79 year old veteran of World War II. (D.I. 3 at 1) Between November and December 1998, plaintiff alleges he was treated and x-rayed at the Veterans Hospital in Wilmington, Delaware. (Id. at 2) On November 28, 2000, plaintiff states that he was again examined by

Dr. Philip Sirota and told that he had "some problems within [his] lungs." (Id.) Plaintiff was subsequently x-rayed but told that everything was normal and he had no problems. (Id.) On or about January 17, 2001, plaintiff asserts that he received a message on his answering machine from Dr. George Tzanis of the Veterans Administration in Elsmere, Delaware stating that he believed that plaintiff had cancerous lesions in his lungs. (Id. at 3) Upon returning the phone call, plaintiff contends that he was told by Dr. Tzanis that the "cancerous lesions first showed up in 1998 and no one had bothered to tell [plaintiff]." (Id.) Plaintiff now seeks compensation pursuant to 38 U.S.C. § 1151.

III. STANDARD OF REVIEW

Defendant moves for dismissal for lack of subject matter jurisdiction, presumably pursuant to Federal Rule of Civil Procedure 12(b)(1). An attack pursuant to this Rule challenges the jurisdiction of the court to address the merits of the complaint. Lieberman v. Delaware, 2001 U.S. Dist. LEXIS 13624, 2001 WL 1000936, at *1 (D. Del. 2001). Such a motion may challenge the court's jurisdiction facially, based on the legal sufficiency of the claim, or factually, based on the sufficiency of jurisdictional fact. Mortensen v. First Fed. Sav. and Loan, 549 F.2d 884, 891 (3d Cir. 1977). The instant case presents a facial challenge because the defendant does not attack the merits of the plaintiff's claims but, rather, alleges procedural

defects. Accordingly, the plaintiff is afforded certain safeguards: the court must accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Mortensen, 549 F.2d at 891.

IV. DISCUSSION

Defendant now moves to dismiss the complaint for lack of jurisdiction. (D.I. 11) In support of its motion, defendant states that plaintiff's complaint alleges tortious conduct by defendant, an agency of the United States. As such, jurisdiction over such a claim, if any, lies under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Section 2675(a) of the FTCA states in relevant part that

[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675 (2003).

Because the plaintiff's claims of neglect and nuisance constitute allegations of negligent or wrongful acts or omissions by an individual acting in an official capacity on behalf of a federal agency, they are construed as claims pursuant to the FTCA. See Nickle v. United States Army Corps of Eng'rs, 2003 U.S. Dist. LEXIS 11740, *1 (D. Del. 2003). "The FTCA is designed

to ease court congestion, expedite fair settlement, and provide equitable treatment to the injured individual.” Frantz v. United States, 791 F. Supp. 445, 447 (D. Del. 1992). To further these goals, the Act requires any claimant to file an administrative claim “to the appropriate Federal agency” before filing suit in court. 28 U.S.C. § 2675(a) (2003). Such a claim constitutes: (1) an executed Standard Form 95 or other written notification of the incident; (2) a claim for a sum certain for money damages alleged to have resulted from the incident; and (3) if the claim is filed on behalf of the claimant, evidence of the authority to present a claim on behalf of the claimant. 28 C.F.R. 14.2(a) (2003); Frantz, 791 F. Supp. at 448. The claim must “have been finally denied by the agency in writing and sent by certified or registered mail” before the claimant may bring a suit in court. 28 U.S.C. § 2675(a).

Fulfillment of the administrative claim requirement is an essential prerequisite to the court’s subject matter jurisdiction over an FTCA claim. Dondero v. United States, 775 F. Supp. 144, 147 (D. Del. 1991) (“Tort claims against the United States shall be barred unless they are first presented in writing to the appropriate Federal agency.”). Thus, failure to comply with the administrative exhaustion requirement must result in a dismissal. It is the plaintiff’s burden to establish that a proper administrative claim was filed. Frantz, 791 F. Supp. at 449. In

this case, defendant states, and plaintiff does not deny, that plaintiff has never sought an administrative remedy in this matter. Therefore, this court must dismiss plaintiff's complaint and grant defendant's motion to dismiss.

V. CONCLUSION

At Wilmington, this 31st day of July, 2003, for the reasons stated; IT IS ORDERED that:

1. Defendant's motion to dismiss (D.I. 11) is granted.
2. Plaintiff's motion for default judgment (D.I. 12) is denied as moot.
3. Plaintiff's motion to disqualify the United States Attorney (D.I. 14) is denied as moot.
4. Plaintiff's motions to amend his complaint (D.I. 13, 15) are denied as moot.

Sue L. Robinson
United States District Judge